(24,387)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 643.

AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE S. SCHULTZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between George S. Shultz, plaintiff, and American Surety Company of New York, defendant, a manifest error hath happened to the great damage of the said defendant, American Surety Company of New York, as by its complaint appears; we, being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on October fifth next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 5th day of September in the year of our Lord one thousand nine hundred and fourteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States for the Southern District of New York.

Allowed by

J. M. MAYER,
Judge of the United States District Court for the Southern District of New York.

2 [Endorsed:] L. 13/64. Supreme Court of the U. S. American Surety Co., of N. Y., Plaintiff in error, against George S. Schultz, Defendant in error. (Original.) Writ of Error. Henry C. Willcox, Attorney for Plaintiff in error, 100 Broadway, New York City. U. S. District Court, S. D. of N. Y. Filed Sept. 5, 1914.

3 *Summons.*

United States District Court, Southern District of New York.

L. 13–64.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Charles M. Hough, Judge of the District Court of the United States, for the Southern District of New York, at the Borough of Manhattan in the City of New York, this 24th day of July, in the year one thousand nine hundred and fourteen.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

KELLOGG & ROSE,
Attorneys for Plaintiff.

Office & Post Office Address: #115 Broadway, Manhattan, New York City.

4 United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
vs.
AMERICAN SURETY COMPANY, Defendant.

Præcipe.

The Clerk is requested to issue summons against the following named defendant, vis: American Surety Company. The residence of plaintiff is 50 West 130th Street, Borough of Manhattan, New York City.

The office address of plaintiff's attorneys of record is 115 Broadway, New York City, and all papers in this cause may be served upon said attorneys, Kellogg & Rose, at No. 115 Broadway, New York City.

KELLOGG & ROSE,
Attorneys for Plaintiff.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 24, 1914.

5 *Proof of Service of Summons.*

United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Asa B. Kellogg, being duly sworn, deposes and says that he is the managing clerk in the office of Kellogg & Rose, attorneys for the plaintiff herein, and that on the 24th day of July, 1914, at 100 Broadway, in the Borough of Manhattan, New York City, deponent then being over the age of twenty-one years, he served the annexed Summons and Complaint personally upon the above named American Surety Company of New York, the defendant herein, by delivering copies thereof to Henry C. Willcox, personally, and leaving the same with him; that he knew the said Henry C. Willcox to be at that time the Vice-President of the said American Surety Company of New York, and knew the Corporation so served to be the Company mentioned and described in said Summons and Complaint as the defendant in this action.

ASA B. KELLOGG.

Sworn to before me this 24th day of July, 1914.
[SEAL.] LAWRENCE L. CASSIDY,
Notary Public, #654, N. Y. County.

6 *Complaint.*

United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The plaintiff complains of the defendant and respectfully shows to this Court:

First. That heretofore and at all the times hereinafter mentioned, the plaintiff was and now is a resident of the City and County of New York.

Second. That the defendant the American Surety Company is a domestic corporation duly organized and existing under the Laws of the State of New York.

Third. That on April 30th, 1912, an action was begun by this plaintiff against James A. Whitcomb in the Supreme Court of the State of New York to recover the sum of $30,566.56 as damages for breach of a contract, which action was thereafter removed by the

said James A. Whitcomb to the United States Circuit Court,
7 for the Southern District of New York.

Fourth. That thereafter said action was tried and a verdict rendered in favor of this plaintiff and against the said James A. Whitcomb, for $24,607.95, and a judgment was entered upon said verdict in favor of plaintiff and against the said James A. Whitcomb on June 14th, 1913, in the Office of the Clerk of the United States District Court, for the Southern District of New York, for the sum of $25,106.50.

Fifth. That thereafter and from the judgment so entered a writ of error was sued out by the said James A. Whitcomb, to review the said judgment by the United States Circuit Court of Appeals, for the Second Circuit.

Sixth. That in conformity with the Statute in such case made and provided, the defendant herein and said James A. Whitcomb, duly made and filed with the Clerk of the U. S. District Court, for the Southern District of N. Y., and delivered to the plaintiff, in connection with such action or proceeding, its certain bond or undertaking under seal, in words or terms as follows:—

8 "District Court of the United States for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
JAMES A. WHITCOMB, Defendant.

Know all men by these presents, That we, James A. Whitcomb, of McAlester, Oklahoma, as Principal, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, New York City, New York, as Surety, are held and firmly bound unto the above-named George S. Shultz, his executors, administrators and assigns; in the sum of thirty thousand dollars ($30,000), lawful money of the United States of America, to be paid to the said George S. Shultz, his executors, administrators and assigns; for the payment of which well and truly to be made, we jointly and severally bind ourselves and our respective executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated the tenth day of July, in the year of our Lord, one thousand nine hundred and thirteen.

Whereas, the said James A. Whitcomb, has sued out a writ of error to the United States Circuit Court of Appeals for the Second Judicial Circuit, to reverse the judgment rendered in the above entitled suit by the District Court of the United States, for the Southern District of New York.

Now, therefore, the condition of this obligation is such, That if the above-named James A. Whitcomb shall prosecute his said writ of error to effect and answer all costs and damages that may be awarded against him if he shall fail to make his plea good, then this

obligation shall be void; otherwise, to remain in full force and virtue.

JAMES A. WHITCOMB. [L. S.]
AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
[L. S.] GEORGE R. CROSBY,
Resident Assistant Secretary."

9 Seventh. That thereafter, and on the 1st day of July, 1914, the mandate of the United States Circuit Court of Appeals, for the Second Circuit, was filed in the United States District Court for the Southern District of New York, affirming said judgment with $25 costs, and thereafter and on July 8th, 1914, an order was entered in said action directing that the judgment of the United States Circuit Court of Appeals, for the Second Circuit be made the judgment of the United States District Court for the Southern District of New York.

Eighth. That said James A. Whitcomb did not prosecute said writ of error to effect and failed to make his plea good whereby there was a breach of said bond and no part of said judgment of $25,106.50 or said costs, amounting to $25, or interest thereon, has been paid, although payment thereof has been duly demanded.

Wherefore, plaintiff demands judgment against the defendant for Twenty-five thousand one hundred six and 50.100 dollars ($25,106.50) with interest thereon from June 14th, 1913, and for $25 (Twenty-five dollars), with interest thereon from July 1st, 1914, besides the costs and disbursements of this action.

KELLOGG & ROSE,
Attorneys for Plaintiff.

Office & Post Office Address, #115 Broadway, Manhattan, New York City.

10 STATE OF NEW YORK,
County of New York, ss:

George S. Shultz, being duly sworn, says that he is the Plaintiff in this action. That he has read the foregoing Complaint and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

GEO. S. SHULTZ.

Sworn to before me this 24th day of July, 1914.
[SEAL.] LAWRENCE L. CASSIDY,
Notary Public, #654, N. Y. County.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 25, 1914.

11 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Demurrer.

Defendant demurs to the complaint herein, and for causes of said demurrer states:

(1) That it appears upon the face of said complaint that this Court has no jurisdiction of the subject matter of this action in that

(2) No diversity of citizenship of the parties is shown by said complaint, and

(3) That this action is an original action based solely upon a contract, towit, a bond, set forth in said complaint, and

(4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and

(5) That this action does not involve the construction or application of such constitution or law, and

(6) That this action does not involve any question of the validity of such law, or of any State law, and

(7) That this action does not involve any matter or question within the jurisdiction of this or any United States Court.

Dated, August 3rd, 1914.

HENRY C. WILLCOX,
Attorney for Defendant,
100 *Broadway, Manhattan Borough, New York City.*

(*Enclosed:*) U. S. District Court, S. D. of N. Y. Filed Aug. 12, 1914.

12 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Notice of Motion upon Demurrer and for Judgment.

SIR: You will please take notice that the issues of Law raised by the demurrer of the defendant to the complaint of the plaintiff herein will be brought on for trial as a contested motion at a Stated Term of the United States District Court for the Southern District of New York, to be held at the Post Office Building in the City of New York, on the 26th day of August, 1914, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and a motion will then and there be made for an order over-

ruling said demurrer with costs and for judgment absolute in favor of the plaintiff and against the defendant and for such other and further order or relief in the premises as to the Court may seem just and proper.

Yours, etc.,

KELLOGG & ROSE,
Attorneys for Plaintiff.

115 Broadway, New York City.

To Henry C. Willcox, Esq., Att'y for Def't, 100 Broadway, New York City.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Aug. 26, 1914.

13 *Memorandum of Hazel, D. J.*

Upon the authority of

Arnold v. Frost, 9 Bend. 267
Crane v. Buckley, 105 Fed. 401
Egan v. Chicago G. N. R. Co. 163 Fed. 344
Files v. Davis, 118 Fed. 465

the demurrer is overruled. The Court has jurisdiction notwithstanding the absence of a diversity of citizenship and judgment may be entered in favor of Plaintiff.

JOHN R. HAZEL, *D. J.*

Endorsed: U. S. District Court, S. D. of N. Y. Filed Aug. 26, 1914.

14 *Order for Judgment.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York on the 27th Day of August, 1914.

Present: Hon. John R. Hazel, Judge.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The motion to overrule the demurrer of the defendant herein and for judgment in favor of the plaintiff against the defendant upon the pleadings herein coming on to be heard,

Now on reading and filing the Summons and Complaint herein, the demurrer of the defendant, and the notice of motion, together with proof of service thereof, and after hearing Abram J. Rose, of Counsel in favor of the motion and Joseph M. Gazzam, of Counsel in opposition thereto, it is, on motion of Kellogg & Rose, attorneys for plaintiff,

Ordered that the demurrer of the defendant be and the same is hereby overruled, and it is

Further ordered that the plaintiff have judgment against the defendant on the pleadings herein for the amount demanded in the complaint, with costs and disbursements.

JOHN R. HAZEL, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 27, 1914.

15 *Judgment.*

United States District Court for the Southern District of New York.

L. 13-64.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The above named defendant having demurred to the complaint in this action and an order having been entered overruling said demurrer, and directing that the plaintiff recover judgment against the defendant for the amount demanded in the complaint, with costs

Now on motion of Kellogg & Rose, attorneys for plaintiff, it is

Ordered and adjudged that George S. Shultz, the plaintiff, have and recover judgment against the American Surety Company of New York, the defendant, for the sum of Twenty-six Thousand, nine hundred and fifty three and 38/100 Dollars ($26,953.38) damage together with nineteen and 30/100 ($19.30) Dollars costs amounting in all to the sum of Twenty-six thousand, nine hundred and Seventy-two and 68/100 Dollars ($26,972.68) and that he have execution therefor. Judgment signed and filed August 29, 1914.

August 29, 1914.

ALEX. GILCHRIST, JR., *Clerk.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 29, 1914.

16 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Certificate of Question of Jurisdiction.

To the Honorable the Supreme Court of the United States:

The District Court of the United States for the Southern District of New York hereby certifies to the Supreme Court of the United

States that on the 29th day of August, 1914, final judgment was entered in the above entitled action in favor of the plaintiff and against the defendant for the sum of $26,972.68 pursuant to the decision of this Court overruling the demurrer filed by the defendant upon all the grounds specified in said demurrer, which are as follows: (1) That it appears upon the face of said complaint that this Court has no jurisdiction of the subject matter of this action in that (2) No diversity of citizenship of the parties is shown by said complaint, and (3) That this action is an original action based solely upon a contract, to wit, a bond, set forth in said complaint, and (4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and (5) That this action does not involve the construction or application of such constitution or law, and (6) That this action does not involve any question of the validity of such law, or of any State law, and (7) That this action does not involve any matter or question within the jurisdiction of this or any United States
17 Court; said demurrer to be sent up as part of the proceedings, together with this certificate and said judgment, the order upon which it was entered; the memorandum opinion or decision of this Court and the summons and the complaint to which said demurrer was interposed; said papers constituting the record before this Court, and showing that the sole question involved herein is that of the jurisdiction of this Court over the subject of this action; the defendant's contention upon said demurrer and upon the argument thereof, as particularly set forth in said demurrer being that this Court has no jurisdiction thereof, which contention has been overruled by the Court and said final judgment entered against the defendant as aforesaid, in accordance with said ruling.

The said question of jurisdiction raised herein is as follows:

Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation organized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a supersedeas and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said
18 United States Court for the Southern District of New York; (the said surety not being a party to said action) it appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?

Given under the hand of a Judge of the District Court of the United States for the Southern District of New York, and under the seal of said Court, this 4th day of September, 1914, within the

term at which said decision, order and judgment were rendered, made and entered.

[SEAL.]

JOHN R. HAZEL,
United States District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

19 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant

Assignment of Errors.

Now comes the above named defendant by its attorney and presents the following assignment of errors in connection with the petition for a writ of error from the judgment herein out of the Supreme Court of the United States:

The Court erred:

1. In holding that the Court has jurisdiction of this action;
2. In overruling the defendant's demurrer to the complaint herein;
3. In granting the order entered on the 27th day of August, 1914, directing that the plaintiff have judgment against the defendant on the pleadings herein for the amount demanded in the complaint, with costs and disbursements;
4. In granting and entering the judgment rendered in favor of the plaintiff on the 29th day of August, 1914, for the sum of $26,972.68;
5. In rendering judgment against the defendant for any sum whatsoever.

Wherefore, defendant prays that said judgment entered on the 29th day of August, 1914, be reversed, and that the complaint herein be dismissed for want of jurisdiction in the said District Court.

Dated, New York, September 5th, 1914.

HENRY C. WILLCOX,
Attorney for Defendant.

100 Broadway, Manhattan Borough, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

20 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Petition for Writ of Error.

American Surety Company of New York, defendant herein, conceiving itself to be aggrieved by the judgment entered in the above entitled action on the 29th day of August, 1914, for the sum of Twenty-six Thousand Nine Hundred Seventy-two 68/100 ($26,-972.68) damages and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said defendant all of which will more in detail appear in the assignment of errors filed with the petition, does hereby pray that a writ of error may be issued in its behalf out of the United States Supreme Court for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the case, duly authenticated, may be sent to said United States Supreme Court, and that such other proceedings may be had as may be proper.

Dated, New York, September 5th, 1914.

HENRY C. WILLCOX,
Attorney for Defendant.

100 Broadway, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

21 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Order Allowing Writ of Error.

Final judgment having been entered herein on the 29th day of August, 1914, in favor of the plaintiff and against the defendant in the sum of Twenty-six Thousand Nine Hundred Seventy-two 68/100 ($26,972.68) damages and costs upon the order entered herein on the 27th day of August, 1914, directing the said judgment and overruling the defendant's demurrer to the complaint herein, which was interposed upon the ground that this Court has no jurisdiction of the subject of this action, for the reasons particularly specified in said demurrer and in the certificate of the question of jurisdiction duly made by this Court; now comes the defendant by Henry C. Willcox,

its attorney and files herein and presents to the Court, its petition praying for the allowance of a writ of error out of the Supreme Court of the United States from such judgment, and assignment of errors intended to be urged by it; praying also that a transcript of the record, proceedings and papers in the case, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper; and said defendant offering to file a bond or undertaking in such sum as may be determined by the Court or by the Judge or Justice allowing such writ of error to be sufficient to perfect said writ of error, and to operate as a supersedeas, the condition of which bond or
22 undertaking will be that if the said defendant shall prosecute said writ of error to effect and answer all costs and damages that may be awarded against it if it shall fail to make its plea good, then such bond or undertaking shall be void; otherwise to remain in full force and virtue; it is hereby

Ordered that the writ of error of the defendant be allowed upon the defendant giving such bond or undertaking on said condition in the sum of Thirty Thousand Dollars ($30,000) said bond to be in lieu of all security upon said writ of error and to operate to stay execution for the enforcement of the judgment herein pending the determination of said writ of error and the coming down of the mandate of the Supreme Court of the United States.

Dated, New York, Sept. 5, 1914.

J. M. MAYER, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

23 *Supersedeas Bond.*

United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Know all men by these presents, That we American Surety Company of New York, as Principal, and National Surety Company as surety, both corporations organized under the laws of the State of New York, are held and firmly bound unto George S. Shultz, in the full and just sum of Thirty Thousand ($30,000.00) Dollars, to be paid to said George S. Shultz, his executors, administrators or assigns; for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. Sealed with our seals and dated the 5th day of September, in the year of Our Lord One Thousand Nine Hundred and Fourteen.

Whereas, the said American Surety Company of New York, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered against it in the above entitled

action by the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named American Surety Company of New York, shall prosecute its said writ of error to effect, and answer all costs and damages if it fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By L. E. CARMAN, *Vice-President.*

[SEAL.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

24 STATE OF NEW YORK,
County of New York, ss:

On this 5th day of September, 1914, before me personally came L. E. Carman to me known, who being by me duly sworn, did depose and say that he resides in Nutley, New Jersey; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

[SEAL.] (Sgn.) H. P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York County, New York County No. 7, New York Register No. 5060.

25 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of September one thousand nine hundred and fourteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of American Surety Company of New York as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions

of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of American Surety Company of New York is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2,000,000) dollars.

That —— —— is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

[SEAL.] WM. A. THOMPSON.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 5th day of September, 1914.

[SEAL.] H. E. EMMETT,
Notary Public.
(Officer's Signature, description and seal.)

Approval of Bond.

Within bond approved Sept. 5, 1914.

J. M. MAYER, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

26 UNITED STATES OF AMERICA, *ss:*

To George S. Shultz, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on October fifth 1914, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein American Surety Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 5th day of September, in the year of our Lord one thousand nine hundred and fourteen.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York.

27 [Endorsed:] L. 13-64. Supreme Court of the U. S. American Surety Co., of N. Y., Plaintiff in error, against George S. Shultz, Defendant in error. (Original.) Citation. Henry C. Willcox, Attorney for Plaintiff in error, 100 Broadway, New York City. U. S. District Court, S. D. of N. Y. Filed Sept. 8, 1914. L. 13/64.

Service of a copy of the within Citation is hereby admitted.
Dated Sept. 5th, 1914.

KELLOGG & ROSE,
Att'ys for Defendant in Error.

28 Supreme Court of the United States.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
GEORGE S. SHULTZ, Defendant in Error (Plaintiff Below).

Præcipe to Clerk for Record on Writ of Error.

To the Clerk of the District Court of the United States for the Southern District of New York:

Please include in the record in error in the above case the following papers:

1. Summons and Præcipe therefor, and proof of service
2. Complaint
3. Demurrer
4. Notice of Motion for Judgment
5. Memorandum of Judge Hazel
6. Order for Judgment
7. Judgment
8. Certificate of question of Jurisdiction
9. Assignment of Errors
10. Order allowing writ of Error
11. Petition for Writ of Error
12. Writ of Error
13. Supersedeas Bond and Approval
14. Citation and proof of service
15. This Precipe.

and add to the above papers your certificate as required by law and by the practice of the Court.
Dated, September 16th, 1914.

Yours, etc., HENRY C. WILLCOX,
Attorney for Plaintiff in Error,
100 *Broadway, Manhattan Borough, New York City.*

Service of a copy of the within Præcipe is hereby admitted.
Dated, Sept. 16, 1914.

KELLOGG & ROSE,
Att'ys for Defendant in Error.

U. S. District Court, S. D. of N. Y. Filed Sep. 16, 1914.

29 UNITED STATES OF AMERICA,
Southern District of New York, ss:

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff-in-Error (Defendant Below),
vs.
GEORGE S. SHULTZ, Defendant-in-Error (Plaintiff Below).

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter and of the assignment of errors and all proceedings in the case, including the opinion of the Court.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this first day of October, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-ninth.

[Seal District Court of the United States, South. Dist. N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[Endorsed:] U. S. District Court, Southern District of New York. American Surety Co. of New York, Pl't'f-in-Error (Def't below), against George S. Shultz, Def't-in-Error (Pl't'f below). Transcript of Record on Appeal.

Endorsed on cover: File No. 24,387. S. New York D. C. U. S. Term No. 643. American Surety Company of New York, plaintiff in error, vs. George S. Schultz. Filed October 3d, 1914. File No. 24,387.

FILED

DEC 29 1914

IN THE

United States Supreme Court

OCTOBER TERM, 1914

No. 56

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff in Error
(Defendant below)

against

GEORGE B. SKELTY,
Defendant in Error
(Plaintiff below)

In Error to the District Court of the United States and the Supreme Court of New York

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

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CHARLES F. HARRIS
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Counsel
Of Counsel

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United States Supreme Court

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in error, against GEORGE S. SHULTZ, Defendant in error.	October Term, 1914. No. 643.

BRIEF FOR PLAINTIFF IN ERROR

This case comes before this Court upon writ of error to the United States District Court for the Southern District of New York, for the direct review of a judgment rendered in an action at law upon a supersedeas bond.

Statement of Facts

The present action which was commenced by original process (Summons p. 2, fol. 3) is between George S. Shultz, a resident and citizen of New York (Complaint, p. 3, f. 6), the plaintiff below, and American Surety Company of New York, a corporation organized under the laws of that state, the defendant below, (Complaint p. 3, f. 6). The action in which the bond was given was an action at law for damages for alleged breach of contract, brought by said George S. Shultz as plaintiff in the Supreme Court of the State of New York against one James A. Whitcomb, and was, by the latter removed to the said United States District Court (Complaint, pp. 3-4, ff. 6-7). Judgment was entered upon a verdict of a jury against Whitcomb in said action, and he sued out

a writ of error to the Circuit Court of Appeals, for the Second Circuit, and gave the bond which is the subject of the present action, to procure a supersedeas, pending the hearing of the writ of error (Complaint, p. 4, ff. 7-8). The judgment in the action of Shultz against Whitcomb was affirmed by said Court of Appeals, (Complaint, p. 5, f. 9). Shultz then brought this action against the defendant below as surety on said bond. Whitcomb is not a party to the present action. The Surety Company was not a party to the action against Whitcomb.

The Surety Company, the defendant below, demurred to the complaint on the following grounds: (1) That it appears upon the face of said complaint that the Court had no jurisdiction of the subject-matter of this action in that (2) No diversity of citizenship of the parties is shown by said complaint, and (3) That this action is an original action based solely upon a contract, to wit, a bond, set forth in said complaint, and (4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and (5) That this action does not involve the construction or application of such constitution or law, and (6) That this action does not involve any question of the validity of such law, or of any state law, and (7) That this action does not involve any matter or question within the jurisdiction of this [the District Court] or any United States Court. (Demurrer, p. 6, f. 11.)

Upon the motion of Shultz, the plaintiff below, and against the opposition of the Surety Company, the defendant below, the District Court overruled the demurrer. (See Notice of Motion, p. 6, f. 12; Memorandum of Hazel, D. J., p. 7, f. 13. Order for Judgment, p. 7, f. 14; and Judgment, p. 8, f. 15.)

Thereupon the District Judge who rendered the decision made a certificate to this Court, showing that the

said Court had rendered final judgment in the action, upon overruling the demurrer; setting forth the grounds of the demurrer, (See Certificate of Question of Jurisdiction, pp. 8-10 ff. 16-18), and stating the question involved as follows:

The Question Certified

"Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation organized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a supersedeas and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said United States Court for the Southern District of New York (the said surety not being a party to said action); it appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?" (Record, p. 9, ff. 17-18).

The Errors Assigned

These are (Record p. 10, f. 19) that the Court erred: (1) in holding that it had jurisdiction; (2) in overruling the demurrer to the complaint; (3) in granting the order

for judgment; (4) in entering judgment in favor of the plaintiff for the sum of $26,972.08; and (5) in rendering judgment against the defendant below for any sum whatever.

The Law of the Case

It is well settled that the lower federal courts are courts of limited statutory jurisdiction. It follows that the burden of establishing a new and independent ground of jurisdiction (not specifically conferred), should be upon the party asserting it. It is contended by the defendant in error, that the United States District Court has jurisdiction over this particular action of covenant upon a sealed instrument, because the enforcement of the obligation of a supersedeas bond is merely an incident of and a proceeding ancillary to a principal litigation in which the same federal court had jurisdiction upon one of the grounds specifically enumerated by the statute conferring jurisdiction. It would seem therefore, that unless the defendant in error could satisfy this Court either upon authority or principle, that an action of covenant on a supersedeas bond is merely ancillary to the action in which the bond was given, the question certified must be answered in the negative.

We submit that neither upon well considered precedent or authority, nor upon any established principle, may the enforcement of a supersedeas bond given under the federal statute be regarded as merely ancillary, but it is an independent common law action, that in the State of New York at least, it is so regarded, and that there is no New York State practice in conformity with which the federal courts in New York may deal summarily with this class of bonds.

The Law of the Case

We will first consider the cases cited by the learned District Judge below, as the basis for his assumption of jurisdiction, and the federal cases generally upon this point, and will then briefly endeavor to show that there is no analogy between common law actions to enforce common law obligations, and the chancery practice which permits the equity courts to deal summarily with bonds given as an incident to interlocutory relief, nor with that class of cases based upon state statute and state practice.

The Federal Cases

The earliest of the cases at all in point upon this jurisdictional question, and the one cited and relied upon in *Crane vs. Buckley,* 105 Fed. Rep., 401, which in turn was relied upon by the learned District Judge in deciding this case, below, was the case of *Seymour vs. Phillips Company,* 7 Biss., 460. In that case it was squarely decided that an action on a *supersedeas* bond begun by original process in the United States Court, was maintainable without reference to diverse citizenship or other special ground of jurisdiction as a case "arising under a law of the United States." The decision was based upon two grounds, one of convenience; and the other that it was proper that the federal court should entertain an action upon a *supersedeas* bond given under the federal statute for the reason that questions were *likely* to arise as to the meaning of the bond, its scope and the construction, scope and validity of the federal statute under which it was given. The entire argument upon which this decision rests has been disposed of by two recent adjudications of this Court, in which the opinions were delivered by Mr. Justice Van Devanter, defining clearly what is meant by "a case arising under a law of the United States." The first of these cases is that of *Shulthis vs. McDougal,* 225 U. S., page 561, in which (at page 569) the following language is used;

"A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Again, in *Taylor vs. Anderson,* 234 U. S., 74, the Court in reaffirming this view as to what constitutes a case arising under a law of the United States, further decided that it is quite immaterial that there may arise or even that there is *likely* to arise in a suit which has its origin in a federal statute, some question concerning the scope and validity of the statute, unless the existence of such a question appears affirmatively from the necessary allegations of the plaintiff's pleading. In that very case the plaintiff sought to inject a federal question by anticipating in his pleading a defense against his claim which was founded upon a federal statute. The proper proceeding to raise such a question in this Court was pointed out by the District Judge in the case of *Taylor vs. Anderson,* 197 Fed. Rep., at p. 388, which was to wait until the construction or validity was drawn in question in the state court, and then take the case to this Court on appeal from the highest state court. From the foregoing, it would appear that the ground of decision of the leading case in point in the federal reports upon this question, has been invalidated by the decisions of this Court just referred to.

The principal case relied upon by the learned District Judge below, in disposing of this jurisdictional question, was *Arnold vs. Frost,* 9 Ben., 267. In that case another suggested ground was discovered and announced to wit: that an action to enforce a *supersedeas* bond is in the nature of an ancillary proceeding. *Arnold vs. Frost* cited as authority for this ground of decision, the case of *Jones vs. Andrews,* 10 Wallace, 327. That was a case

where a garnishment proceeding having been instituted in the Circuit Court, a bill filed in the same Court to enjoin those proceedings, was held to be not an original suit, but a defensive or supplementary suit, and one therefore that might be maintained irrespective of the diverse citizenship of the parties.

The distinction between an original suit and an ancillary one is both ancient and well established, and it is conceded that if a *supersedeas* bond is made the basis of purely ancillary proceedings in a federal court that the diversity of citizenship becomes unimportant. For instance, in the case of *Reilly vs. Golding,* 10 Wallace, 56, the facts were that a forthcoming bond had been given on an attachment, and a rule to show cause was issued in the original suit against the sureties on that bond, as was permitted by the state practice under a statute of Louisiana; that practice having been adopted by the United States Circuit Court, it was held that the proceeding there was merely incidental to the principal suit. The following cases also are based upon the same principle as *Reilly v. Golding,* namely that where the state practice expressly authorizes a summary remedy on a bond given in an action at law, a federal court sitting in the state as a court of law adopts such practice, pursuant to the conformity act; *Hiriart v. Ballon,* 9 Peters 156, *Smith v. Gaines,* 93 U. S., 341 (both adopting the Louisiana statute); *Beall v. New Mexico,* 16 Wall 535, and *Moore v. Huntington,* 17 Wall, 417 (both adopting the New Mexico statute).

In *Hatch vs. Dorr,* 4 McLean, 112 which is another of the cases cited in *Arnold vs. Frost* as authority for its ruling, there was involved a judgment-creditor's bill between the same parties to enforce a judgment, and it was held that a mere change of residence after the judgment had been secured, did not oust the jurisdiction,

as the suit was not an original suit. The Court defined an original suit as follows: "Original bills are those which relate to some matter not before litigated in the Court by the same persons standing in the same interests." It will be observed that in the case at bar, this *supersedeas* bond has never been litigated, nor was the surety who is sued upon it before the Court in any other suit, until brought in by original process in the present action, which is an ordinary action upon a sealed instrument. From an examination of all the authorities cited in support of *Arnold vs. Frost,* it would appear either that summary process by writ of inquiry, based upon state practice was involved, as in the case of *Bobyshall vs. Oppenheimer,* 4 Washington, C. C., 482; or that there was in question a marshal's bond, as in the case of *Gwin vs. Breedlove,* 2 Howard 29; or an equity suit to restrain proceedings at law in the same Court, as in *Dunn vs. Clarke,* 8 Peters, 1. In the latter case, the Court made an important distinction, holding a bill for an injunction against the enforcement of a judgment rendered in a federal court to be ancillary as between the same parties but original as to new parties, and that as to the latter the jurisdiction depended on citizenship. Of the other cases cited by District Judge Hazel in passing upon the case at bar, *Egan vs. Chicago Great Western R. Co.,* 163 Fed., 344, was a case of summary proceedings based upon a state statute, and *Files vs. Davis,* 118 Fed., 465, was a case of an attachment bond, and one in which a distinct federal question was presented (see p. 470).

It would appear therefore, that the *Seymour* case, which was followed by the case of *Crane vs. Buckley* was based upon reasoning which has been repudiated by this Court, and that in the case of *Arnold vs. Frost* the adjudication proceeded upon the theory that because the bond had been given in the course of a proceeding

in a federal court, that such court was the logical tribunal to enforce the bond, and that the proceedings to enforce such a bond were to be treated as merely ancillary to the action in which the bond was given. This line of reasoning has also been repudiated by this Court. If an action on a bond given on appeal from a judgment is to be regarded as purely ancillary to the action in which the judgment below was rendered, what must be said of a proceeding to enforce the judgment itself? This Court has held that if the proceeding to enforce the judgment takes the form of an action on the judgment, it is an independent proceeding, and one in which the federal court must acquire its jurisdiction upon the ground of diverse citizenship, unless some distinct question is presented as to the construction of or validity of the Constitution or a law of the United States. In the three cases which we cite in this connection, the argument was made that diverse citizenship was unimportant because the actions were founded upon judgments of United States Courts. The three cases are, *Provident Savings Society vs. Ford,* 114 U. S., 635; *Metcalf vs. Watertown,* 128 U. S., 586; and *Carson vs. Dunham,* 121 U. S., 421. In the *Metcalf* case the Court per Mr. Justice Harlan, said (128 U. S. at p. 588):

"• • Nor can the jurisdiction of the circuit court be maintained upon the theory that the suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself make it a suit of that character; for the plaintiff, without raising by his complaint any distinct question of a federal nature, and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown. *Provident Sav. L. Assur. Soc. v. Ford,* 114 U. S. 635, 641. • • • "

Again, in *Carson v. Dunham,* 121 U. S. at p. 429, the court, per Mr. Chief Justice Waite, said with respect to a defense based upon a decree of a federal court:

"* * * It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question 'distinctly involving the laws of the United States.' "

And he goes on to say that the proper method of bringing the case into the federal jurisdiction, in the event that the defendant be deprived of any right under the authority of the United States court judgment would be to take the case to the Supreme Court on writ of error, after it had gone to the highest state court, as provided by Section 709 of the United States Revised Statutes.

Remedies upon Injunction and other Equity Bonds Distinguished

It was decided by this Court in the case of *Russell v. Farley,* 105 United States, 433, that the enforcement of an injunction bond by ancillary proceedings, is based upon the chancery practice which governs the practice of the federal equity courts. It must be quite clear that there is little if any, similarity between a bond the amount of which, the giving of which, and the enforcement of which, is within the judicial discretion of the Chancellor as an incident to interlocutory or final relief, and frequently the price paid for the relief, and a statutory appeal bond which is a matter of right, a complete remedy upon which is afforded by both the state and federal law courts within their respective jurisdictions over the parties. Aside from the statutes and practice which prevail in some states, allowing summary remedies upon all bonds and certainly in the State of New York where no such summary jurisdiction

exists, this distinction has been clearly recognized. In the only reported case in New York, and that case not officially reported, *Cambreling vs. Purton,* 16 New York Supplement 49, the general term of the New York Supreme Court in the first department held that an appeal bond could not be enforced by a summary remedy in the action in which the bond was given, but that a new independent and plenary action at law must be brought upon it; and in the case of *Waysman vs. Updegraff,* 1 Kansas 516, the court held expressly that while the liability of a surety upon an injunction bond was properly enforced by a summary remedy that a similar proceeding should be refused as against the surety upon an appeal bond given in the same case. Unquestionably a common law action is, in the absence of statute, the only remedy upon an appeal bond. *Miller vs. Hogeboom,* 56 Neb., 434; *Hadley vs. Bernero,* 97 Mo. App., 314 *Willard vs. Fralick,* 31 Mich. 431; *Stephens vs. Miller,* 80 Ky. 47. In the courts of New York State, an original common law action is the only remedy upon an appeal bond, and if the United States R. S. Section 914 justifies a departure from the common law rule in those states which have changed the common law, it would seem that it should be at least strongly persuasive of the propriety of conforming to the New York common law practice with respect to all appeal bonds, including *supersedeas* bonds given under the federal statute. Even in cases arising in the equity branch of the federal court, there has been a limit to the extent to which the federal courts have been willing to stretch the doctrine of ancillary jurisdiction. For instance, in the case of *Kirker vs. Owings,* 98 Fed. 499, 508-9, it was held that in the absence of statute, court rule or express stipulation, in the bond of a receiver, the obligation of the bond could only be enforced against the surety by an action in a court of law. And in this connection it is interesting to note that this court has

held that the mere fact of the appointment of a receiver by order of a court of the United States, does not create a federal question, or give the receiver the right to take a suit against him into the federal jurisdiction, even by writ of error to this Court from the state court, so long as the litigation does not directly draw in question the validity of his authority as an officer of a federal court. See *Bausman vs. Dixon,* 173 U. S. 113; *Gableman vs. Peoria Ry. Co.,* 179 U. S., 335.

THE CASE OF TULLOCK VS. MULVANE.

This case is relied upon by our adversaries. An examination of it discloses that it is really an authority in our favor.

In *Tullock vs. Mulvane,* 184 U. S., 497, the majority of this Court found that a federal question actually arose. The action was brought in a State Court of Kansas upon an injunction bond given in a Federal Court. It came here upon writ of error to the highest State Court. The question in dispute was whether attorneys' fees could be recovered as part of the damages under the bond. This question necessarily involved the scope, effect and meaning of the bond. The Supreme Court of Kansas had held, contrary to the rulings of the Federal Courts in similar cases, that attorneys' fees were part of the damages accruing under the bond; and by such ruling this Court held that the defendant had been deprived of immunity under the federal law from such liability. As to certain propositions pointed out in the minority opinion, there was no disagreement between the members of this Court; these were: (see p. 516) that the action on the bond, which was an ordinary action at law, could not be considered a mere incident to the injunction proceeeding, nor could it be regarded as auxiliary to the proceeding in the Federal Court; and that the action had been properly brought in the state court and

could have been brought in no other. It is not suggested in the majority opinion nor anywhere in the case that a federal question arose simply because the bond was given in a Federal Court; but it was pointed out that the federal question arose *because the parties took opposing views as to the scope and effect of the bond.* If the *Tullock* case had come up from a Federal Court on a certificate showing, as ours does, that the action was between citizens of the same state,

"and that no question was raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given" (Judge Hazel's Certificate, p. 9, f. 18.)

it cannot be doubted that this Court would have unanimously decided against the federal jurisdiction. If, as our adversaries claim, in the case at bar, all argument is foreclosed by the mere suggestion that the suit is brought on a bond given in a Federal Court, we hardly think that the members of this Court would have disagreed in the *Tullock* case, or that they would have devoted over twenty pages of the official report to discussing when, in a suit upon such a bond, a federal question arises, and when it does not.

Both in the *Tullock* case, and in *Mo. etc., R. R. Co., v. Elliott,* 184 U. S., 530, this Court was asked to determine the *scope and effect* of bonds given in federal courts. It is to be noted that both of these cases orginated in state courts, and came here on writs of error after passing through the highest courts of the states.

Other Bond Cases Distinguished

There are some other cases in which it would appear that federal courts have entertained actions on bonds irrespective of diversity of citizenship, but these have

all been cases such as suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts, where the bonds ran to the United States. Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable, has been dispelled by the decision of this Court (*U. S. Fidelity Co. vs. Kenyon*, 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled, and in most of the cases of this character, it will be found upon examination that either the statute which authorized the giving of the bond expressly conferred a right to sue upon it in the federal court, or that the suit involved a question as to the scope or construction of the statute under which the bond was given.

THE DOCTRINE OF ANCILLARY JURISDICTION CANNOT BE INVOKED IN THIS CASE.

As it was held by McDonald, J., in *Conwell v. White Water Valley Canal Co.*, 4 Bissell, 195, federal courts will entertain ancillary proceedings to enforce rights claimed by or against parties to the original litigation adversely to parties thereto or to other persons, (in the absense of diversity of citizenship between the parties to the ancillary controversy) only "* * * If no state court has power to guard and determine those rights and interests without a conflict of authority with the national court;" in such cases, "the latter court will, *from the necessity of the case*, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship. * * *" Our case is not one in which the state court has no power to guard and determine the rights of the plaintiff below; it may just as

readily do so by entertaining an action on the supersedeas bond as it could by entertaining an action on the judgment against Whitcomb which was rendered in the United States District Court.

State courts have frequently sustained actions upon bonds given in federal courts. *Wood v. Coman,* 56 Ala. 283. *Saunders v. Taylor,* 6 Mart. (N. S.)519. *Aiken v. Leathers,* 37 La. Ann., 482. *Braitwait v. Jordan,* 5 N. D. 196. *Mont. Min. Co. v. St. Louis Min. Co.,* 19 Mont. 322 *Rhodes v Ashurst,* 176 Ill. 351. *U. S. v. Douglas,* 113 N. C. 190.

That a common law action upon an appeal or supersedeas bond given in one court may be maintained in another is well settled. *Gallagher v. Flannelly,* 22 Wend., 614, *Curtice v. Bothamly,* 90 Mass., 336 *Commonwealth v. Gould,* 48 Pa. Super. Ct. 528-534; although it was pointed out in the above cases that an ancillary remedy, such as a *scire facias,* would have to be brought in the same court as that in which the bond was given.

Equity will assume jurisdiction either to stay or aid an action at law, to give validity to defenses in a pending action at law, etc., and in these cases, bills although commenced by original process, if between the same parties and involving the same interests, may be ancillary to actions at law; but it is respectfully submitted that unless the case of *Arnold vs. Frost* should be held to establish a new extension of the meaning of word ancillary, that no case can be found where one original independent action at law has been held to be ancillary to another.

Suppose the sole defense of a surety upon a bond given in a federal court should take the form of a plea of payment, or in the case of an individual surety, a plea of infancy, upon which issue is joined by the plaintiff. Could it be held that the issue arising upon such a plea involves a federal question, merely because the bond was given in

a federal court? Would not the surety be entitled to a common law jury trial upon either of the issues here suggested? And how could such a jury trial in one common law action be considered as ancillary to the proceedings in a prior common law action between different parties, which had already ended in judgment?

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT SHOULD BE REVERSED, WITH DIRECTIONS TO THE LEARNED COURT BELOW TO DISMISS THE CASE BECAUSE OF ITS LACK OF JURISDICTION THEREOF.

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IN THE

United States Supreme Court

OCTOBER TERM, 1914.

No. 643

AMERICAN SURETY COMPANY OF NEW YORK
Plaintiff in Error
(Defendant below)

against

GEORGE S. SHULTZ
Defendant in Error
(Plaintiff below)

(IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK)

Brief of Plaintiff in Error in Opposition to Motions to Affirm or Transfer to Summary Docket

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Supreme Court of United States

American Surety Company of New York, Plaintiff in Error, against George S. Shultz, Defendant in Error.	October Term, 1914 No. 643

Brief in Opposition to Motion to Affirm or Transfer to Summary Docket

This case comes before this Court upon a writ of error to the District Court of the United States for the Southern District of New York, and a certificate of the latter Court showing that the sole question before it was one concerning its jurisdiction.

Statement of Facts

The motion is to affirm and allow 10 per cent. damages on the ground (Brief of Defendant in Error, p. 11):

"It is obvious that the demurrer was interposed solely for the purpose of delay and to prevent the collection of the judgment obtained by the defendant in error against Whitcomb after a full and fair trial before a jury, and after all the contentions available to him and raised by his counsel had been passed upon adversely by the Circuit Court of Appeals and the judgment in favor of the defendant in error affirmed."

In view of the mass of extraneous matter contained in the brief in support of these motions a statement of the salient facts concerned in this litigation becomes necessary. The Robertson Sales Company, a corporation, sold chewing gum to persons who rented from it automatic vending devices. These latter were in turn sup-

plied it by one Plumb, a well known and experienced manufacturer of clockwork machines, whose machines worked satisfactorily. The Great American Automatic Vending Machine Company, a New Jersey corporation, sought this business, and represented that it was specially equipped with machinery and expert and experienced workmen to turn out a large order and make deliveries more rapidly than Plumb could. As a result of these representations the Sales Company entered into a contract for $46,000, worth of the machines and one James A. Whitcomb, a friend and backer of the Sales corporation, in consideration of one dollar, bound himself by a separate contract of suretyship to the faithful performance by the Sales Company of its part of the contract.

The principal contract read simply that the Machine Company agreed to manufacture according to model (the model being one of the Plumb machines). It was *absolutely silent* as to whether the making of the machines might or might not be farmed out and the parts simply assembled in the Machine Company's shop. That is to say, the antecedent representations were not expressly reiterated in the written contract as warranties, the contract merely providing that the Machine Company agreed to manufacture the machines. (The contract is printed as Appendix 1 of this brief.)

The machines delivered by the Machine Company would not work, the Sales Company's business was therefore being ruined, and it refused to accept further deliveries. After a lapse of time the Machine Company went out of business, and made an assignment of its claims to one Shultz, the defendant in error here. Shultz sued the surety, Whitcomb, who, having learned in the meantime, that the Machine Company had never manufactured clockwork machines, had no machinery for that purpose and no skilled and experienced workmen, and in addition had never from the beginning, even at the time the representations were made, intended to manu-

facture in its own shop, attempted to defend on this ground, as well as on the ground that the machines had proved worthless. Judge Mack at the instance of the defendant in error, the then plaintiff, *excluded all evidence* as to the representations made to the surety, as amounting to fraud in the inducement and not admissible as a defense on *the law side* of the Court. The Court thereupon instructed the jury that it was unimportant that the machines would not work, as the contract only required them to conform to model and, to use Judge Mack's own words:

"I find nothing *in this contract* to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all these dies, patterns and special tools, for each and every distinct part (fol. 1780)."

(The above is quoted from Judge Mack's instruction to the jury incorporated in Judge Hand's opinion printed at page 17 of brief in support of motion.) The jury returned a verdict for Shultz for about $25,000, being made up of anticipated profits and material claimed to have been bought to be furnished the sub-contractors and for labor of assembling certain machines, etc. Whitcomb appealed to the Circuit Court of Appeals and assigned as error, *inter alia,* that his principal defense of the fraud practiced upon him had been excluded. The defendant in error, by the same counsel who present this motion in his behalf, argued that no error had been committed in this regard, for the reason, as stated in their brief:

"The distinction between relief at law and in equity is clearly marked in the Federal Courts and an equitable defense may not be proved in an action at law, but relief must be sought by an appropriate action in equity. *Burns vs. Scott,* 117 U. S., 582; *Thompson vs Railroad Company,* 73 U. S., 134; *Lewis vs. Cocks,* 90 U. S., 466; *Oelrichs vs. Spain,* 82 U. S., 211; *Lindsay vs. Bank,* 156 U. S., 485."

* * * * *

"Such a defense, within the rule stated, clearly was an equitable defense not cognizable in a Court of Law. On

this ground alone the exclusion of the evidence and the refusals to charge complained of clearly were proper."

(verbatim extracts from brief submitted on behalf of George S. Shultz in the Circuit Court of Appeals upon the hearing of the writ of error from the judgment at law.)

No reference occurs in the opinion of the Circuit Court of Appeals to Whitcomb's defense covered by this assignment of error. (See brief in support of motion p. 13.) It obviously adopted the view supported by the decisions relied upon by Shultz.

Whitcomb having been, at the instance of Shultz, remitted to the Equity Court for relief from the fraud practiced upon him and which had cost him $25,000, filed his bill on the Equity side to have the contract of suretyship cancelled and the collection of the judgment enjoined. The motion for an injunction *pendente lite* came up before District Judge Hand, who took the extraordinary position that Judge Mack having held, in the law case, that the principal contract did not in terms require the machines to be manufactured in the manner and under the conditions represented to the surety, the falsity of the representations became immaterial, and that Judge Mack's interpretation of the contract was a *res adjudicata.*

The temporary injunction having been denied upon grounds which disposed of the bill itself, Shultz brought his action against the plaintiff in error here, the American Surety Company; and the real object of the present motion is to get the $25,000, into Shultz' hands before the Circuit Court of Appeals can review Judge Hand's decision. The dismissal of the bill was by Judge Lacombe, who simply followed Judge Hand's opinion. The temporary injunction having been refused, and Shultz being a dummy assignee, his assignor being of no financial responsibility, Whitcomb at once appealed from the dismissal. We expect to argue said appeal at the November session of the Circuit Court of Appeals.

Statement of Facts

Inasmuch as Judge Hand's opinion is printed as an exhibit in the moving brief, we have taken the liberty of reprinting here our analysis of his decision (appendix II) as the same appears in our brief already printed for use in the United States Circuit Court of Appeals. If that Court should fail to approve of a surety, who had been tricked and defrauded, being made the shuttelcock between the law and equity sides of the District Court, denied a hearing in one because he ought to be in the other, and denied a hearing in the latter because he has already been heard in the former; the relief granted by it will be a mockery if, as a result of this motion, the money is collected by Shultz and beyond the reach of possible recovery.

It is also moved to summarily affirm on the ground that the question certified is frivolous. As color for that motion the brief filed in support contains the statement (Brief p. 7) that District Judge Hazel in giving judgment below, did so on the ground:

"as appears by his memorandum of opinion, that the District Court clearly had jurisdiction, and that the demurrer was wholly frivolous and without merit."

By reference to the memorandum in question (Rec. p. 7, f. 13) the latter portion of this statement is found to be wholly without foundation in fact. What really occurred was that District Judge Hazel being asked to base his decision in part at least on that ground distinctly and in terms refused to do so.

The Question Certified

After showing how the question arises, the certificate of the District Court states it as follows:

"Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation or-

ganized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a *supersedeas* and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said United States Court for the Southern District of New York; (the said surety not being a party to said action). It appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?" (Record, p. 9, fols. 17-18).

The Errors Assigned

These are (Record p. 10, f. 19) that the Court erred: (1) in holding that it had jurisdiction; (2) in overruling the demurrer to the complaint; (3) in granting the order for judgment; (4) in entering judgment in favor of the plaintiff for the sum of $26,972.68; and (5) in rendering judgment against the defendant below for any sum whatsoever.

The Law of the Case

The earliest of the cases at all in point upon this jurisdictional question, and the one cited and relied upon in *Crane vs. Buckley,* 105 Fed. Rep., 401, which in turn was relied upon by the learned District Judge in deciding this case below, was the case of *Seymour vs. Phillips Company,* 7 Biss., 460. In that case it was squarely decided that an action on a *supersedeas* bond begun by original process in the United States Court, was maintainable without reference to diverse citizenship or other special ground of jurisdiction as a case "arising under

a law of the United States." In deciding that case, the learned Judge who rendered the opinion stated that it was a new question. The decision was based upon two grounds, one of convenience; and the other that it was proper that the Federal Court should entertain an action upon a *supersedeas* bond given under the federal statute for the reason that questions were *likely* to arise as to the meaning of the bond, its scope and the construction, scope and validity of the federal statute under which it was given. The entire argument upon which this decision rests has been disposed of by two recent adjudications of this Court, in which the opinions were delivered by Mr. Justice Van Devanter, defining clearly what is meant by "a case arising under a law of the United States." The first of these cases is that of *Shulthis vs. McDougal,* 225 U. S., page 561, in which (at page 569) the following language is used: "A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Again, in *Taylor vs. Anderson,* 234 U. S., 74, the Court in reaffirming this view as to what constitutes a case arising under a law of the United States, further decided that it is quite immaterial that there may arise or even that there is *likely* to arise in a suit which has its origin in a federal statute, some question concerning the scope and validity of the statute, unless the existence of such a question appears affirmatively from the necessary allegations of the plaintiff's pleading. In that very case the plaintiff sought to inject a federal question by anticipating in his pleading a defense against his claim which was founded upon a federal statute. The proper proceeding to raise such a question in this Court was pointed out by the District Judge in the case of *Taylor vs. Anderson,* 197 Fed. Rep., at p. 388, which was to wait

until the construction or validity was drawn in question in the State Court, and then take the case to this Court on appeal from the highest State Court. From the foregoing, it would appear that the ground of decision of the leading case in point in the federal reports upon this question, has been invalidated by the decisions of this Court just referred to.

The principal case relied upon by the learned District Judge below, in disposing of this jurisdictional question, was the case of *Arnold vs. Frost,* 9 Ben., 267. In that case another suggested ground was discovered and announced, to wit: that an action to enforce a *supersedeas* bond is in the nature of an ancillary proceeding. *Arnold vs. Frost* cited as authority for this ground of decision, the case of *Jones vs. Andrews,* decided by this Court, 10 Wallace, 327. That was a case where a garnishment proceeding having been instituted in the Circuit Court, a bill filed in the same Court to enjoin those proceedings, was held to be not an original suit, but a defensive or supplementary suit, and one therefore that might be maintained irrespective of the diverse citizenship of the parties. The distinction between an original suit and an ancillary one is both ancient and well-established, and it is conceded that if a *supersedeas* bond is made the basis of purely ancillary proceedings in a Federal Court, that the diversity of citizenship becomes unimportant. For instance, in the case of *Reilly vs. Golding,* 10 Wallace, 56, the facts were that a forthcoming bond had been given on an attachment, and a rule to show cause was issued in the original suit against the sureties on that bond, as was permitted by the State practice under a statute of Louisiana; that practice having been adopted by the United States Circuit Court, it was held that the proceeding there was merely incidental to the principal suit. In *Hatch vs. Dorr,* 4 McLean, 112, which is another of the cases cited in the case of *Arnold vs. Frost* as authority for its ruling, there was involved a judgment-creditor's bill between the same parties to en-

force a judgment, and it was held that a mere change of residence after the judgment had been secured, did not oust the jurisdiction, as the suit was not an original suit. The Court defined an original suit as follows: "Original bills are those which relate to some matter not before litigated in the Court by the same persons standing in the same interests." It will be observed that in the case at bar, this *supersedeas* bond has never been litigated, nor was the surety who was sued upon it before the Court in any suit, until brought in by original process in the present action, which is an ordinary action upon a sealed instrument. From an examination of all the authorities citied in support of *Arnold vs. Frost,* it would appear either that summary process by writ of inquiry, based upon state practice, was involved, as in the case of *Bobbyshall vs. Oppenheimer,* 4 Washington, C. C., 482; or that there was in question a marshal's bond, as in the case of *Gwin vs. Breedlove,* 2 Howard 29; or an equity suit to restrain proceedings at law in the same Court, as in *Dunn vs. Clarke,* 8 Peters, 1. In the latter case, the Court made an important distinction, holding a bill for an injunction against the enforcement of a judgment rendered in the Federal Court to be ancillary as between the same parties but original as to new parties, and that as to the latter, the jurisdiction depended on citizenship. Of the other cases cited by District Judge Hazel in passing upon the case at bar, *Egan vs. Chicago Great Western R. Co.,* 163 Fed., 344, was a case of summary proceedings based upon a state statute, and *Files vs. Davis,* 118 Fed., 465, was a case of an attachment bond and one in which a distinct federal question was presented (see p. 470).

It would appear therefore, that the *Seymour* case, which was followed by the case of *Crane vs. Buckley* was based upon reasoning which has been repudiated by this Court, and that in the case of *Arnold vs. Frost* the adjudication proceeded upon the theory that because the bond had been given in the course of a proceeding in

the Federal Court, that the Federal Court was the logical tribunal to enforce the bond, and that the proceedings to enforce such a bond were to be treated as merely ancillary to the action in which the bond was given. This line of reasoning has also been repudiated by this Court. If an action on a bond given on appeal from a judgment is to be regarded as purely ancillary to the action in which the judgment below was rendered, what must be said of a proceeding to enforce the judgment itself? This Court has held that if the proceeding to enforce the judgment takes the form of an action on the judgment, it is an independent proceeding, and one in which the Federal Court must acquire its jurisdiction upon the ground of diverse citizenship, unless some distinct question is presented as to the construction of or validity of the Constitution or a law of the United States. In the three cases which we cite in this connection, the argument was made that diverse citizenship was unimportant because the actions were founded upon judgments of United States Courts. The three cases are, *Provident Savings Society vs. Ford,* 114 U. S., 635; *Metcalf vs. Watertown,* 128 U. S., 586; and *Carson vs. Dunham,* 121 U. S., 421. What, after all is the test as to whether an action is ancillary or original? Does it depend upon the fact of some historical connection with some other proceeding, or is the fact that other parties and different interests are involved the crucial test? This Court answered that question in the case of *Dunn vs. Clark, (supra.)* There the same bill was held to be ancillary in so far as it sought to enjoin the collection of a judgment rendered in the Federal Court as between the original parties to that litigation and original with respect to new parties who had been made co-defendants. In the case at bar, it might perhaps be contended that had this action on the bond been brought against Whitcomb, it would have been in the nature of an ancillary proceeding in spite of the fact that it was in form an original action. But to go further and hold that one action at law against B, is

ancillary to another action at law against A, is to lose sight entirely of what is meant by the word ancillary in this connection. Equity will assume jurisdiction either to stay or aid an action at law, to give validity to defenses which can be used in a pending action at law, etc., and in these cases, bills although commenced by original process, if between the same parties and involving the same interests, have been held to be ancillary to actions at law; but it is respectfully submitted that unless the case of *Arnold vs. Frost* should be held to establish a new extension of the meaning of the word ancillary, that no case can be found where one original independent action at law has been held to be ancillary to another. There are some other cases in which it would appear that Federal Courts have entertained actions on bonds irrespective of diversity of citizenship, but these have all been cases such as suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts, where the bonds ran to the United States. Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable, has been dispelled by the decision of this Court (*U. S. Fidelity Co. vs. Kenyon,* 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled; and in most of the cases of this character, it will be found upon examination that either the statute which authorized the giving of the bond expressly conferred a right to sue upon it in the Federal Court, or that the suit involved a question as to the scope or construction of the statute under which the bond was given.

Suppose the sole defense of a surety upon a bond given in a Federal Court should take the form of a plea payment, or in the case of an individual surety, a plea

of infancy, upon which issue is joined by the plaintiff. Could it be held that the issue arising upon such a plea involves a federal question, merely because the bond was given in a Federal Court?

Would not the surety be entitled to a common law jury trial upon either of the issues here suggested? And how could such a jury trial in one common law action be considered as ancillary to the proceedings in a prior common law action between different parties, which had already ended in judgment?

In *Tullock vs. Mulvane,* 184 U. S., 497, the only case in this Court cited by our adversaries, the majority of the Court found that a federal question actually arose. The action was brought in a State Court of Kansas upon an injunction bond given in a Federal Court. It came here upon writ of error to the highest State Court. The question in dispute was whether attorneys' fees could be recovered as part of the damages under the bond. This question necessarily involved the scope, effect and meaning of the bond. The Supreme Court of Kansas had beld, contrary to the rulings of the Federal Courts in similar cases, that attorneys' fees were part of the damages accruing under the bond; and by such ruling this Court held that the defendant had been deprived of immunity under the federal law from such liability. As to certain propositions pointed out in the minority opinion, there was no disagreement between the members of this Court; there were: (see p. 516) that the action on the bond which was an ordinary action at law, could not be considered a mere incident to the injunction proceeding, nor could it be regarded as auxiliary to the proceeding in the Federal Court; and that the action had been properly brought in the State Court and could have been brought in no other. It is not suggested in the majority opinion nor anywhere in the case that a federal question arose simply because the bond was given in a Federal Court; but it was pointed out that the federal question arose *because the parties took opposing views as*

to the scope and effect of the bond. If the *Tullock* case had come up from a Federal Court on a certificate showing, as ours does, that the action was between citizens of the same state,

"and that no question was raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given." (Judge Hazel's Certificate, p. 9, f. 18.)

it cannot be doubted that this Court would have unanimously decided against the federal jurisdiction. If, as our adversaries claim, in the case at bar, all argument is foreclosed by the mere suggestion that the suit is brought on a bond given in a Federal Court, we hardly think that the members of this Court would have disagreed in the *Tullock* case, or that they would have devoted over twenty pages of the official report to discussing when, in a suit upon such a bond, a federal question arises, and when it does not.

It is respectfully submitted that the motions should be denied.

HENRY C. WILLCOX,
Attorney for Plaintiff-in-Error.

Charles F. Carusi,
Walter B. Grant,
Joseph M. Gazzam,
Of Counsel.

Appendix I

(A)

[Contract between Robertson Sales Co. and Great American Automatic Vending Machine Co.]

THIS AGREEMENT made this third day of December, 1908, between Robertson Sales Company, a corporation of the State of New Jersey, having its principal office at 164 Market Street, in the City of Newark, County of

Essex, State of New Jersey, party of the first part, and The Great American Automatic Vending Machine Company, a corporation of the State of New Jersey, having its principal office at 1041 Clinton Street, in the City of Hoboken, County of Hudson, State of New Jersey, party of the second part,

WHEREAS, the party of the first part desires that the party of the second part shall manufacture for them Ten Thousand (10,000) Vending Machines under the patents pending of the party of the first part, including all dies, patterns, special tools, etc., necessary for the manufacture of said Vending Machines, for the sum of Forty-six Thousand ($46,000) Dollars.

Now therefore, THIS AGREEMENT WITNESSETH

That for and in consideration of the payments to be hereinafter made by the party of the first part and covenants entered into by the party of the first part, the party of the second part does hereby agree to manufacture for the party of the first part Ten Thousand (10,000) Vending Machines like to the model deposited by the party of the first part with the party of the second part, on which patents are pending as aforesaid (except such alterations as have been agreed upon as set forth below) and all of the dies, patterns and special tools necessary for the purpose of manufacturing to be completed as follows:

Twenty (20) machines to be completed by the said party of the second part on the fifteenth day of February, 1909, or sooner if possible, and twenty (20) machines for each working day (excepting Sundays and Holidays) thereafter, until the total number of Ten Thousand (10,000), are constructed.

And it is further agreed that the alterations referred to in the preceding paragraph shall be

I. The opening at the bottom of the machines where goods are delivered is to be enlarged as much as is mechanically permissible to allow goods to lie more flat after dropping from the magazine.

II. The inside surface of the two side plates (known as such) are to be polished nickel instead of the dull finish.

III. The spreaders and holding shafts for the two side plates are to be held by screws instead of being riveted.

IV. The governor brake is to be of steel instead of the material now used.

And it is further agreed that each ten machines are to be packed in a case with partitions, with paper, excelsior, or other suitable packing around the machines so as to insure a reasonably safe package, which filled cases the party of the second part agrees to deliver f. o. b. freight cars or Express Company in Hoboken, N. J., at the direction of the party of the first part, taking receipt therefor and in the event of shipment by freight, to procure two copies of said receipt or bill of lading, one to be forwarded to consignee in a stamped envelope, to be furnished by the party of the first part, the other to be forwarded to the party of the first part with invoice.

And it is further agreed that the party of the second part will number all machines with a serial number prefixed by the letter "A," beginning with number "I," and will state on each invoice the numbers of the machines covered by said invoice.

And it is further agreed that the party of the second part guarantees first-class material and workmanship and any machines defective from the above causes may be returned to the party of the second part to be replaced or rectified by them. All defects claimed, however, shall be reported to the party of the second part not later than five days after machine has been put in operation by the party of the first part or their agents.

The party of the first part agrees to pay to the party of the second part or its assigns, the aforesaid sum and for the manufacturing thereof as follows:

On the first working day of each week a sum equivalent to the amount of machines manufactured during the previous week at the rate of Four dollars and Sixty Cents

($4.60) per machine, until the whole amount is paid.

And it is further agreed between the parties hereto that in case strikes, lock-outs, fires, or ony unforseen circumstances, over which the party of the second part has no control, shall happen so as to interfere with the manufacture or turning out of the required number of machines, the said party of the second part may have sixty (60) days to comply with the terms of this contract.

And it is further agreed that the party of the second part will provide storage of said machines of the party of the first part, but not to exceed the product of thirty (30) days' manufacture.

And it is further agreed that in case the party of the first part desires more machines per day, equal to a double output, or up to forty (40) machines per day, than those provided for by the terms of this contract, the same will be manufactured by the party of the second part, provided the party of the first part gives the party of the second part twenty (20) working days' notice of such desire to increase the delivery, and providing less than Eight Thousand (8,000) machines have been completed, and that the party of the first part will pay for same on the same basis as hereinbefore provided, then in that case, the party of the second part will so manufacture and deliver said double output, or up to forty (40) machines per day.

And it is further agreed that when all of the machines are manufactured and paid for fully pursuant to this contract that all dies, patterns, etc., made for these machines by the party of the second part, shall be the property of the party of the first part.

And it is further agreed that in case of suspension of work on this contract for a period in excess of sixty (60) days as provided in this contract by the party of the second part, by reason of strikes, lock-outs, fire, or any other unforseen circumstances, then the dies, pat-

terns, and other special tools manufactured by the party of the second part, on this contract, shall be delivered to the party of the first part, upon payment to the party of the second part by the party of the first part of the sum equivalent to the pro rata cost of the dies, patterns, etc., on that portion of the number of machines on this contract which have not been completed, based on the pro rata cost per machine of said dies, patterns, etc.

And it is further agreed that upon completion of the making of the dies, patterns, tools, etc., the party of the second part will inform the party of the first part of the amount estimated as the cost of said dies, patterns, etc.

And it is further agreed that the dies, patterns, etc., made under this contract shall be kept in proper working order, so that at the completion of this contract, the same may be delivered to the party of the first part by the party of the second part, if the party of the first part so desires, in first-class condition, with such reasonable wear and tear as will be caused by the work done with them.

In Witness whereof the respective parties hereto, have respectively caused their seals to be affixed, signed by their respective presidents, and attested by their respective secretarys.

Attest: E. E. St. Germain,

GEORGE ROBERTSON, Prest.

(Corporate Seal of Robertson Sales Co.)

E. S. Gittens,

E. E. St. Germain, Temp. Sec'y.

Attest: The Great American Automatic Vending Machine Company.

E. E. BAUMANN, Prest.,

(Corporate Seal of Great Am. Auto. Vend. Mach. Co.)

O. Klug, Sec'y.

Appendix I (B)—Suretyship Contract

(B)

[Suretyship Contract]

In consideration of the sum of one dollar ($1) to me in hand paid by The Great American Automatic Vending Machine Company and in further consideration of the making of said contract, I do hereby promise and agree to and with them, that the within named Robertson Sales Company, party of the first part, will faithfully perform and fulfill everything in the foregoing agreement on its part and behalf to be performed and fulfilled at the time and in the manner in said contract provided, and I do hereby waive and dispense with any demand upon the said Robertson Sales Company, and any notice of non-performance on its part.

Witness my hand and seal this fourth day of December, 1908.

JAMES A. WHITCOMB, (L. S.)

Signed, sealed and delivered
in the presence of
E. E. St. Germain.

Appendix II

[Extract from brief of Whitcomb to be used in Circuit Court of Appeals on argument of appeal in equity suit to restrain collection of judgment on ground of fraud].

Argument

Stated briefly, this case presents the singularity that, by tossing the ball from one jurisdiction to another, Whitcomb is made the victim of a legal legerdemain whereby he is to be mulcted of $25,000, under a contract of suretyship which is voidable according to every settled principle of law and rule of decision. When sued in the law court, he is told that the fraud practiced upon him is of exclusively equitable jurisdiction; when he goes into

a Court of Equity he is told that the subject-matter of his complaint is *res adjudicata* in the law court.

Fraudulent representations are made to induce Whitcomb to enter into a separate written contract of suretyship. The principal contract is absolutely silent as to the matters covered by these false statements so that in no sense are the parol representations *waived* or *modified* by the written terms of either the principal contract or the contract of suretyship. We emphasize this statement and respectfully challenge a reading of these contracts with a view to discover one single word or clause which is inconsistent with or at variance with the statements set out in the bill of complaint. If, too on the one hand, the Court can find nothing in the contract *affirmatively requiring* the machines to be made as was orally represented to Whitcomb, they would be made, on the other hand, nothing can be found *affirmatively agreeing* to the farming out and subletting of the work, or indicating that such was the intention or privilege of the "Great American Automatic Vending Machine Company" or that it lacked the experience and facilities for doing the work.

Judge Hand saw an inconsistency between the oral statements made to the surety and the principal contract as "liberally interpreted" by Judge Mack in the action at law.

Judge Mack's liberal interpretation went no further than to hold that there was nothing upon the face of the written contract itself which *affirmatively required* the machines to be manufactured by the Company itself, and to that extent the "liberal interpretation" is an adjudication. It is unavailing now, in any event immaterial, that the adjudication in question would never have been made if evidence could have been admitted as to the representations which preceded the contract. The real point is that the interpretation was an adjudication of a negative fact and not of an affirmative character. The decision was that there was *nothing* in the

contract on the face of it to *prevent* farming out the work. We are compelled to admit that. It is *res adjudicata.* But to go further and take the position that a surety consents to everything not in express terms prohibited by the principal contract; and that an adjudication that a thing is not *prohibited* is an adjudication that the surety consents to it, is to announce a new and startling innovation in time honored legal principles. Under this theory no case can ever arise for the cancellation or rescission of a contract on the ground of fraud *in the inducement.* Oral representations as to collateral facts must either be included in the written contract as warranties or be held to have been waived.

Judge Hand in disposing of the motion for an injunction practically disposed of the entire case. His opinion that the bill should be dismissed is based upon two grounds, or rather upon a blending of two grounds, to wit:

1st. That the principal contract has been adjudicated to be inconsistent with the alleged antecedent misrepresentations.

2nd. That the surety was not injured by the Machine Company doing something that its contract permitted it to do.

Both of these bases of decision must stand or fall with the premises upon which they rest, and we therefore again ask the Court to lay the written contract and the allegations of the bill side by side and find, if it can, a word or syllable in the contract which is inconsistent with the allegations of the bill. If by the expression "If the contract *allowed* the Machine Company" is meant merely, what an inspection of the contract will disclose, that it was *silent* upon that point, and contained no express *interdiction,* the whole fabric of the opinion of Judge Hand must fall, as in conflict with absolutely settled principles of law; if, on the other hand, he means by the constant use of the word "allowed," that the contract was in terms, or was ever held by Judge Mack to be

in terms, inconsistent with the statements made to the surety and others, the opinion of the learned Judge is predicated upon non-facts.

We have no desire to juggle words or split hairs, but on the other hand when a meritorious defense is excluded on purely technical grounds in one branch of the Courts and is then refused to be heard in another more appropriate tribunal on the ground that the rankest fraud is excused because the contract "allowed" the fraud to be perpetrated, we have a right to know just what is meant by "allowed" so that we can look into the contract and see if the statement is correct. If the learned Judge below is right, his opinion could have been rendered in four words instead of four pages: *Volenti non fit injuria.*

The opinion filed by Judge Hand must stand or fall by the result of this test, and we are willing to hazard our rights to a reversal of the lower Court upon the outcome of such an analysis.

Judge Hand in his opinion, in the second paragraph thereof, himself states Judge Mack's interpretation of the contract as simply that it, "did not require the Machine Company to build the machines in their own shops."

"There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into *did not require* the Machine Company to build the machines in their shops, but only to deliver machines made like the model, the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law, that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury" (Judge Hand's opinion—Italics ours).

We respectfully submit that the foregoing statement by the learned Judge amounts to the announcement of

the following legal principles, to wit; that one cannot be injured by the falsity of representations that a thing will be done in a particular manner and by a particular person, unless these representations are repeated in the subsequent written contract which the victim is induced to enter on the faith of the antecedent representations. That is not the law and never was the law. It may be true that the written contract "did not require the Machine Company to build the machines in their own shops," but it is a far cry from merely not requiring that a thing shall be done in a particular way, to hold that this is equivalent to a consent that it may be done in some other way. It is clear that if statements are made to a man to induce him to enter into a contract and he does enter into a contract, the expressed terms of which, or even the fair implications from which, are at variance with the previous parol representations, the former are undoubtedly merged into the latter. The parol evidence rule proceeds upon a somewhat similar basis, and gives effect to the terms of the written agreement rather than to parol statements, whether antecedent or contemporaneous, which are at variance with it. But Judge Hand's decision is the first instance known to counsel where a contract being silent with respect to statements made to induce its execution, it has been held that the failure to reiterate the statements, in the form of a requirement in the contract itself, would nullify the legal effect of the representations made; or in which it was decided that the defrauded party could not complain, if he had omitted to include in the contract a formal requirement that the antecedent statement should be made good. We quite agree with the statement in the opinion of the learned Court below, that the fraud must touch some matter material to the action of the injured party, but the action that is meant, is one that would have kept the victim away from his injury, and it is clear from the allegations of the bill that the false representations in this case were such that had they not been made Whit-

comb would have refused to become surety, and indeed the Robertson Sales Company would never have entered into the contract. It must not be overlooked, that the position of a surety entitles him to something more than ordinary business honesty, and the law is well settled that his contract is one *strictissimi juris,* and that even a trivial alteration in his contract, or the slightest misrepresentation to him, will avoid his contract. The cases are well settled upon this point, and some of them are cited at another point in this brief. The record disclosed that the Great American Automatic Vending Machine Company paid Whitcomb $1, as a consideration for his assuming a liability of $46,000.00. It would seem that he would at least be entitled that he should not have been lied to and deceived into assuming so large a responsibility. The motive which induced Whitcomb to assume this liability must not be confused with the consideration which moved to him from the Machine Company, and reference is only made to the fact that the consideration is purely nominal as illustrative of one of the reasons why a surety is entitled to be treated with upon a different plane than may exist between the principals.

Even at the risk of tiresome repetition, we call attention to other instances of what we conceive to be the illogic in the opinion of the learned Court below. For instance, constant reference to the contract "allowing" the Machine Company to manufacture anywhere. These references are invariably made the basis of the conclusion that if the written contract "allows" a thing to be done, a previous representation that it would not be done is nullified by the permission, consent or allowance to be found in the terms of the contract. Attention has already been called to the fact that in the beginning of the second paragraph of the opinion, the learned District Judge states Judge Mack's interpretation of the contract, as simply not in terms requiring the Machine Company to manufacture in its own shops, and again at the bottom of the second to last paragraph of the opinion he quotes the very language of Judge Mack, as follows:

"I find nothing in this contract to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally, and had to manufacture all those dies, patterns and special tools, for each and every distinct part (fol. 1780)."

The above clause is cited below the statement that "because the contract was more liberally interpreted, and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract." Again, in the third paragraph of his opinion, the learned Judge says, speaking of the assurances that the machines would be manufactured by the Machine Company itself, "such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations". We have already seen that the contract did not impose any different obligations. Curiously enough, the learned Judge has, by easy stages, proceeded from a contract which, in the first paragraph in the opinion, did not require a thing to be done to a contract in a latter part of the opinion which allowed that thing to be done and finally, to a contract which imposed an obligation that it should be done. Judge Mack's interpretation of the contract and that placed upon it by this Court, stopped at the first of these steps. Again it is said, "if these facts could constitute any such fraud, they would have been a good defense in the action at law, because they would have shown that the Machine Company had not substantially performed". That statement could only be true where the contract by its expressed terms required the goods to be manufactured in the Company's own shops, and as applied to a case like the present, does not correctly state the law. There would be no equity for the cancellation or rescission of a contract obtained by fraudulent representations, if there were an adequate remedy at law by way of claim of insufficient performance. As far as these representations might have been availed

of in the law Court, otherwise than as a bar to the action, it would have been as surrounding circumstances in the light of which a different construction might have been put upon the principal contract, and if Judge Mack's refusal to receive facts in evidence as a defense, was open to review, counsel would gladly urge upon this Court that instead of a "liberal interpretation" doing away with Whitcomb's defense. Whitcomb's defense would have done away with the "liberal interpretation". Can this Court, or could Judge Mack have possibly placed upon the contract with the Robertson Sales Company, the interpretation which was placed upon it, had it been read in the light of the antecedent representations which had been made to Whitcomb and to the officers of the Robertson Sales Company as to the equipment in men and machinery of the Machine Company, and of its purpose to use that equipment to assure the more speedy delivery of the machines than had been possible under the Plumb contract?

The vice in the reasoning of the learned Judge below, can be brought out clearly by an illustration. It is said that the jury found that the Machine Company's output conformed to the model and that it was therefore unimportant whether the machines were made by inexperienced workmen in other shops or were made according to the representations to Whitcomb that they would be made by experienced workmen in the Company's own shops, adequately equipped with machinery. Suppose one requiring a dangerous surgical operation is induced to undergo the same at the hands of a surgeon who is in fact a mere beginner in practice, but who falsely represents that he holds degrees from celebrated medical schools and that he has successfully performed one hundred similar operations. Upon the strength of this representation and before the operation is performed, the patient enters into a written agreement to pay one thousand dollars for the services of the surgeon, provided the patient gets well. Nothing more is included in

the written contract, which as will be seen, is quite silent as to the skill and experience of the surgeon, and therefore "allows" the operation by any kind of a licensed surgeon. The operation is performed and by luck the patient recovers. The surgeon sues upon the contract and the patient offers evidence of the misrepresentations. The Court refuses to hear such evidence on technical jurisdictional grounds and makes a "liberal interpretation" of the contract, under which the jury having found that an operation was performed, and that the patient is well, brings in a verdict against him. His real defense having been excluded by the law Court on the ground that it is cognizable only in equity, the plaintiff goes in equity and is told that if the contract "allowed" any kind of a surgeon whether skillful or not, to perform the operation, and as that was the interpretation which had been placed upon the contract by the Trial Justice, that it would be impossible to see how these representations could have been material. The operation was performed, and the patient is well. Of course, to that the patient might answer "I would not have promised to pay this man anything like one thousand dollars for the performance of the operation had I known he was a mere tyro; in fact had I known that, I would have preferred to take chances of getting well without an operation." That is just Whitcomb's position, that if he had known of the deceit and fraud which was being practiced upon him to induce him to stand sponsor for a forty-six thousand dollar contract of the Robertson Sales Company he would not have become surety, but would have left the Machine Company to decline the contract and the Robertson Sales Company to have gone on buying their machines from Plumb as theretofore. It will certainly be difficult to ever convince a man who has a judgment of twenty-five thousand dollars against him as surety, that he wasn't damaged by the fraudulent misrepresentations whereby he was induced to become surety.

Appendix II—Argument in Equity Appeal

Much capital was sought to be made on the argument in the Court below, that this appellant was not acting in good faith and was simply seeking to obstruct, on all sorts of frivolous pretexts, the collection of the judgment against him; that he had had one trial and now wanted another one, etc. These statements come with peculiarly ill grace, when applied to a defendant who is seeking to resist an original fraud and a subsequent dismissal of the right to substantiate in a court of law his allegations as to the fraud and deceit practiced upon him.

By reference to the appendix filed with this brief it appears that this Court on the appeal from the judgment at law overruled the assignment of error concerning the refusal of the Trial Court to allow Whitcomb to show the fraud practiced upon him, and that its action in that respect must have been influenced by the brief filed on behalf of the appellee, insisting that our sole relief for the fraud was in the Court of Equity. It is certainly fair comment to call the Court's attention to the fact that the appellee might well have sought rather than have evaded having a jury pass upon the allegations of bad faith and fraudulent conduct on the part of his assignor. When he succeeds in avoiding a decision upon the merits of this question in the law Court, through technical objections to the jurisdiction of the Court, it would seem that a Court of conscience would regard with peculiar disfavor the raising of other technical questions to prevent this issue from being tried in a court of equity, and thus to deprive Whitcomb of his day in Court upon a question which would determine his ultimate liability or nonliability in the large sum of $25,000.00.